IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 833 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

YOGESH RAMECHCHANDRA SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 833 of 1994

MR PM THAKKAR for Petitioner No. 1-5,6-10

M/S THAKKAR ASSOC. for Petitioner No. 5/1-5/2

MS MANISHA SHAH, Ld. AGP for Respondent No. 1

MR DIPAK R DAVE for Respondent No. 2

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 05/03/2003

ORAL JUDGEMENT

1. The short facts of the case are that the petitioners are the employees, who have been appointed during the period from 1988 to 1992, which is the period during which the management was given by the State Government to respondent No.2 Trust. It is the case of the petitioners that as per the Government Resolution dated 20-12-1986, on experimental basis the management of the T.B. Sanatorium, which was with the Government was given to respondent No.2 Trust and the said Sanatorium was to be provided with 100% grant by the Government. It is also the case of the petitioners that as per condition No.14, the present existing staff was to be continued on deputation. However, if any staff is not to be taken, then he shall be absorbed in the Government. It was also made clear that if any new recruitment is to be made, the same shall be as per the recruitment rules of the Government and for such purpose Staff Selection Board shall be constituted and the recruitment shall be made. Clause-16 of the said Resolution provides that as and when the management is taken back by the Government, the appointment made of the staff as per Clause-14 shall be absorbed in the State Government and no staff shall be retrenched from service. It is further the case of the petitioners that thereafter in the year 1993, as per the Resolution dated 6-10-1993, the State government has taken decision of taking back the management of the said T.B.Sanatorium from the Trust and the petitioners were not allowed to join duties on their respective posts and under these circumstances, the petitioners had to prefer this petition for appropriate writ to quash and set aside the action of the respondents of not permitting the petitioners to discharge duties and seeking termination of the services of the petitioners.

2. On behalf of the respondent State Government, Mr.R.G.Patel, Administrative Officer has filed the affidavit-in-reply and it has been contended that the Government, after the Resolution dated 6-10-1993, has further passed the Resolution dated 14-12-1993, whereby it is decided to absorb the employees, with reference to conditions No.14 and No.16 of the earlier Resolution dated 20-12-1986, who have completed minimum two years of service and such recruitment should have been as per the recruitment rules of the Government and at the time of appointment, the person should also fulfill the criteria of age prescription. It has also been submitted that so far as petitioner No.1 is concerned the appointment is not by the Staff Selection Board. So far as petitioner No.2 is concerned, it has been submitted that the petitioner has not completed minimum two years of service. So far as petitioner No.4 is concerned, it has

been submitted that he was over-aged. So far as petitioners No.6 to 9 are concerned, it has been contended that the appointment is not made as per the recommendation of the Staff Selection Board and it is further submitted that it cannot be asserted as of right by the petitioners that they should be absorbed in the Government.

3. On behalf of respondent No.2 Trust, no affidavit-in-reply has been filed. However, Mr.Dave, learned Counsel appearing on behalf of respondent No.2, has submitted that the prayers are, in substance, against the Government and, therefore, no affidavit is filed. It is also submitted by him that as such the Trust was managing the affairs pursuant to the Government Resolution on and behalf of the Government and, therefore, the petitioners cannot be said to be employees of the Trust and since the management was only given to the Trust and the Trust was managing the affairs pursuant to the Government Resolution dated 20-12-1986, at the time when the management is taken back it should be with all employees.

4. The learned Counsel appearing on behalf of the petitioners has mainly submitted that so far as petitioner No.1 is concerned, the appointment is made through Staff Selection Board and she fairly submitted that so far as petitioners No.6, 7, 8, 9 and 10 are concerned, the appointment is not made through Staff Selection Board, but is made upon the recommendation of the Staff Selection Board. It has been submitted that once the petitioners were appointed, as per condition No.16 they are entitled to have absorption in the set-up of the Government and it is not open to the State Government to retrench or terminate the service at the time when the management is taken back and, therefore, it has been submitted that all the petitioners are entitled to have absorption in service and, therefore, in any case the decision of not to allow the petitioners to discharge the duties and to terminate the petitioners cannot be sustained in law.

5. On behalf of the State Government, it has been contended by the learned AGP, Ms.Manisha Shah that as per condition No.14 of the Government Resolution dated 20-12-1986 the recruitment was to take place through Staff Selection Board as per the Government Recruitment Rules and it has been further submitted that condition No.16 provides that if the appointment is made as per condition No.14, then only their services shall not be retrenched. It has been further submitted that while the

Government has been taking over the management back as per the resolution dated 6-10-1993, it has been decided to absorb employees who have completed two years of service and they should be fulfilling the necessary criteria including that of age as per the recruitment rules of the Government and, it has been submitted that petitioner No.1 was appointed expecting approval of Staff Selection Board and petitioner No.2 did not complete two years of service. So far as petitioners No.3, 4, and 5 are concerned, they were age-barred and they could not have been appointed by the Trust and also by the Staff Selection Board. So far as petitioners No.6, 7, 8, 9, and 10 are concerned, she submitted that the appointment is not by the Staff Selection Board and, therefore, they have no right of absorption in the set-up of the State Government.

6. Before I consider the contentions raised on behalf of the parties, it is necessary to take note that pending the petition, petitioner No.5, namely Shushilaben B. Rajput has expired and her legal heirs are brought on record. Further it is also necessary to take note that pending this petition, initially interim order of status-quo was granted. Thereafter, the same is continued and it is an admitted position that the petitioners, except petitioner No.5, are working pending the petition with the said T.B.Sanatorium and as on today they have completed about 14 to 15 years of service and in any case about 10 years after taking over management by Government. Therefore, in my view, so far as the termination part is concerned, it will have to be incidentally considered, but the question which is required to be decided is whether the petitioners would be entitled to have the absorption in the set-up of the State Government at the time when the management is taken back by the State Government pursuant to the resolution dated 6-10-1993 or not.

7. It is an admitted position that initially the said T.B.Sanatorium was with the State Government and all the employees of T.B.Sanatorium prior to 20-12-1986 were that of the State Government. In the year 1986 as per the resolution dated 20-12-1986, the State Government decided the hand-over the management on trial basis to respondent No.2 Trust. Various conditions of the resolution go to show that even handing over of the management is on experimental basis and the same is required to be reconsidered at the interval of five years. The Government was to provide 100% grant and the budget is also to be placed before the Advisory Committee of the State Government and the expenses were to be

incurred accordingly. Various conditions No.3 to 9 of the resolution dated 20-12-1986, in my view, show that there was full control of the State Government so far as the financial aspect is concerned and only management was given to respondent No.2 Trust. It further appears that it was contemplated to have on experimental basis and thereafter to give independent status and, therefore, the employees of the State Government were treated as on deputation as per condition No.14. However, the status remained the same, because the recruitment was to take place, as per the recruitment rules of the State Government, by the Staff Selection Board was to be constituted of three members of the Trust, one representative of the State Government being Dy. Director and also of the Health Department. Condition No.16, in my view, is clear to the extent that if new recruitments are made by Staff Selection Board, at the time when the management is taken back, they shall be accommodated in the State Government and they shall not be retrenched. The perusal of the conditions No.14 and 16, in my view, clearly goes to show that the attempt was to hand-over the management on trial basis by retaining full control of financial aspects and also indirect control over the recruitment and a further assurance to accommodate all the staff in case the Government decides to take the management back. Once the Government authorized the Trust to look-after the management and the Committee namely; Staff Selection Board, was so constituted for recruitment and when the Staff Selection Board has made appointment of the petitioners except petitioners No.6 to 10, in my view, it would not be open to the State Government to make a departure from the policy already declared at the time when the management was given pursuant to the resolution dated 20-12-1986. Even if it is considered that certain petitioners from amongst the petitioners except petitioners No.6 to 10 were age-barred, then also the power of fixation of age is coupled with the power of making relaxation. When the Staff Selection Board so constituted had relaxed the criteria of age and appointed the petitioners and until the management is taken over, at no point of time the Government has made any grievance, in my view, it hardly lies in the mouth of the Government to subsequently contend that they shall be retrenched since the appointment was though made by the Staff Selection Board, the concerned petitioners were over-aged. As such the Government, while taking over management back from the Trust, has to abide by conditions No.14 and 16 of the Government Resolution dated 20-12-1986. In my view, the condition put up in the Government Resolution dated 14-12-1993 of accommodating or absorbing only those

employees who have completed minimum two years of service is, on the face of it, arbitrary and is violative of Article 14 of the Constitution in as much as pursuant to the resolution dated 20-12-1986 the management was given to the Trust and the Government was bound to abide by various terms and conditions of the Government Resolution. If such powers are read of accommodating or absorbing the employees who have completed minimum period of two years, then in that case it would run counter to condition No.16 of the Resolution dated 20-12-1986. Therefore, under these circumstances it was obligatory on the part of the Government to abide by conditions No.14 and 16 of the Government Resolution dated 20-12-1986. The employees who came to be appointed had legitimate right of expectation of fullfilling condition No.16 by Government at the time when the management is to be taken back. The learned AGP made an attempt to interpret the resolution in the manner that it is only when the appointment is made as per the Government Recruitment Rules by the Staff Selection Board, the Government can be compelled to accommodate the employees and otherwise not. In normal circumstances, it would have been a correct interpretation, but the peculiar facts and circumstances of the present case are that the management was given on and behalf of the Government to the Trust. Further for the purpose of constitution of Staff Selection Board the representation was very much there of the Government representative. Not only that, but it is the Staff Selection Board, which had only to make recruitment. Once the regular recruitment process is undertaken by the Staff Selection Board and at the time when the recruitment took place, the Staff Selection Board decided to give certain relaxation and ultimately the appointments were given to the meritorious candidates from amongst the available candidates, it cannot be said that the appointments made by the Staff Selection Board is per se void or void ab initio. The said aspect is coupled with the fact that after the appointment until the Government took over the management, at no point of time, the Government has called upon the explanation of the Trust or of the Staff Selection Board, as the case may be, in respect to the appointments made by the Staff Selection Board contrary to the recruitment rules or otherwise. In any event, the employees who have been inducted in service by following regular recruitment process cannot be made to suffer on account of the change of policy of the Government of giving management or taking back the management. In my view, those petitioners, who were appointed by the Staff Selection Board by regular recruitment process, for all purpose, were employees appointed as per the Clause-14 and,

therefore, the State Government was prohibited from terminating or retrenching the services of such persons in view the bar operating under Clause-16 of the Government Resolution dated 20-12-1986. Under the above circumstances the condition that absorption shall be only if one is not age-barred at the time of entry in service, in my view, would also be arbitrary and violative of Article 14 of the Constitution of India.

8. So far as petitioners No.6 to 10 are concerned, it is an admitted position that their appointments were made by the Trust, but upon the recommendation of the Staff Selection Board and, therefore, the appointments cannot be said to be totally in contravention to the Recruitment Rules. All these petitioners have served for a very long period and there is nothing adverse so far as their functioning or the post is concerned. As such the Government could not make any departure from any of the conditions as mentioned in the Government Resolution dated 20-12-1986 and, therefore, even if the stand of the Government is that the Staff Selection Board could not have recommended for appointments and the Trust, in any case, could not have given appointments to petitioners No.6 to 10 upon the recommendation of the Staff Selection Board, the same would not give authority to the Government to terminate the services of the petitioners ipso facto by unilateral action. Once the employee is appointed on regular post, the right is created in favour of the employee unless the appointment is temperory or ad-hoc or ab initio void. Even if the services of any employee are to be terminated on the ground that the authority who appointed the petitioners had not followed proper recruitment process followed, in my view, the minimum observance of principles of natural justice is a must when the appointment is made upon the recoomendation of Staff Selection Board. It is not open to the employer to take unilateral decision, more particularly when such employees have worked for a very long period and more particularly when such employees were inducted in service upon the recommendation of the Staff Selection Board, which can be said to be one of the expert bodies for the purpose of recruitment. Had it been a case of back-door entry, the matter would have been different. It is not even a case of the State Government that there was any back-door entry. However, the case the State Government is that the appointment is not made by the Staff Selection Board, but is made upon the recommendation of the Staff Selection Board. In my view, the Government should consider all these aspects positively and it should also bear in mind that on account of the change of the policy of the Government of giving management and

taking back the management the employees cannot be made to suffer. In any event, as observed earlier the unilateral action on the part of the State Government under the present circumstances to terminate or discontinue the services of petitioners No.6 to 10 cannot be sustained in law. If the Government is so desirous, it would be open to the Government to observe the principles of natural justice and to consider all aspects and then to take decision, but till then even petitioners No.6 to 10 have right to continue in the set-up of T.B.Sanatorium, whose management is taken back by the Government from respondent No.2 Trust.

9. In view of the above discussion I find that the action of the State Government of discontinuing the services of the petitioners is illegal, perverse and violative of Article 14 of the Constitution of India. It is further clarified that all the petitioners except petitioners No.6 to 10 would be entitled to have the accommodation and absorption in the Government as per conditions No.14 and 16 of the Government Resolution dated 20-12-1986. So far as petitioners No.6 to 10 are concerned, for the present, they would be entitled to continue in service subject to the clarification that it will be open to the State Government to follow the procedure in accordance with law by observing principles of natural justice to examine the matter and to take appropriate decision in the matter, keeping in view various aspects including the observations made hereinabove in this judgement. It will be open to the petitioners to approach before the competent authority for consequential benefits in accordance with law in view of the present judgement.

10. The petition is allowed to the aforesaid extent. Rule made absolute accordingly. No costs.

5-3-2003 (Jayant Patel, J.)

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